VARNUM, RIDDERING, SCHMIDT & HOWLETT

ATTORNEYS AT LAW

BRIDGEWATER PLACE
POST OFFICE BOX 352 · GRAND RAPIDS, MICHIGAN 49501-0352
TELEPHONE 616/336-6000 · FAX 616/336-7000

RICHARD W. BUTLER, JR.

DIRECT DIAL 616/336-6527

May 27, 1994

Federal Express

Ms. Linda Bowen
Miller & Holbrooke
1225 19th Street, N.W.
Suite 400
Washington, DC 20036

Re: City of Detroit

Dear Linda:

In accordance with our telephone conversation, we have enclosed an original and 15 copies of the City of Detroit's Response in Support of Petition For Reconsideration and Clarification by the National Association of Telecommunications Officials and Advisors, The National League of Cities, The United States Conference of Mayors, The National Association of Counties, and the City of New York with a cover letter and Proof of Service. Please arrange for filing of the Response and Proof of Service by the close of business on Tuesday, May 31. Please return a time-stamped copy to us.

We appreciate very much your assistance in this matter. If you have any questions, please call Dick Butler at (616) 336-6527.

Very truly yours,

VARNUM, RIDDERING, SCHMIDT & HOWLETT

Kim Smith

Kim Smith
Secretary to Richard W. Butler, Jr.

Enclosures
c: Mr. John Pestle (w/enc.)

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	
Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992	MM Docket No. 92-266
Rate Regulation	

TO: The Commission

CITY OF DETROIT'S RESPONSE IN SUPPORT OF PETITION FOR RECONSIDERATION AND CLARIFICATION BY THE NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICIALS AND ADVISORS, THE NATIONAL LEAGUE OF CITIES, THE UNITED STATES CONFERENCE OF MAYORS, THE NATIONAL ASSOCIATION OF COUNTIES, AND THE CITY OF NEW YORK AND PROOF OF SERVICE

The City of Detroit submits this response in support of the Petition for Reconsideration filed by The National Association of Telecommunications Officers and Advisors, the National League of Cities, the United States Conference of Mayors, and the City of New York (collectively referred to as "NATOA"). The Petition requested the Commission to reconsider certain issues raised by the Second Order on Reconsideration and the Third Order on Reconsideration in the above-captioned proceeding. These issues include the FCC' regulation regarding the advertising of rates by operators serving multiple franchise areas. NATOA requests the FCC to reconsider this regulation because: 1) it would permit a cable operator to advertise rates in violation of the intent of Section 622(c) of the Cable Act, as amended by the Cable Television Consumer Protection and Competition Act of 1992 (the "1992 Cable Act"), 47 USC § 542(c), and the FCC's own

subscriber bill itemization regulation, 47 CFR § 76.985 (1993), and 2) it would suggest that cable operators could itemize franchise fees in a manner that would deprive municipalities of the full five percent (5%) franchise fees to which they are entitled under Section 622(b). The City of Detroit, by and through the Detroit Cable Communications Commission, supports NATOA's Petition For Reconsideration on this issue as set forth herein.

The City of Detroit has previously filed a Petition For Ruling on Complaint (a copy of which is attached as Exhibit A) against Barden Cablevision. In the Petition For Ruling on Complaint, the City is seeking a ruling that Barden Cablevision is not properly calculating franchise fees under Section 622(b) of the 1992 Cable Act and is itemizing franchise fees on subscriber bills in a manner which violates Section 622(c) of the 1992 Cable Act. As set forth in more detail in the City's Petition For Ruling on Complaint[1] and the House Committee Report on the 1992 Cable Act cited therein, the maximum five percent (5%) franchise fee under Section 622(b) must be calculated on the gross revenues of the cable operator, not net revenues (gross revenues less expenses such as franchise fees). Hence, as applied to subscriber revenues, the five percent (5%) maximum in Section 622(b) is measured against the subscriber's total bill, i.e., the gross revenues from the subscriber. For example, if a subscriber pays a total of $30 for cable service, five percent (5%) of $30, or $1.50, must be paid as a franchise fee. This calculation is not changed by the cable operator's decision to itemize franchise fees on subscriber bills, as the FCC has expressly recognized. In the Matter of Implementation of Sections of the Cable Television Consumer

[1]The City's position is set forth in detail in the attached Petition. While we summarize the City's position herein, we request that the Commission read and consider the City's Petition in its entirety.

Protection and Competition Act of 1992: Rate Regulation, Rate Order and Further Notice of Proposed Rulemaking.

As the City of Detroit sets forth in its attached Petition, from 1984 until late 1993 Barden calculated its franchise fee in the exact manner set forth in the House Committee Report on the 1992 Cable Act. That is, if a cable customer sent a check to Barden for $30 for cable service for a month, Barden paid $1.50 (5 percent of $30) to the City as the 5 percent franchise fee. In November, 1993 Barden tried to change its approach to (using the preceding example) of paying a 5 percent franchise fee only on $28.50 (the portion of the $30 exclusive of the fee) claiming this was required by the Commission's rules.

Numerous other franchising authorities and NATOA members have had the same experience--cable operators making the claim for the first time in 1993 that they have to reduce their franchise fees paid to franchised authorities based on this Commission's rate regulation rules and forms (see City of Detroit's Petition, pp. 6-7). Simply put, the cable operators' arguments are incorrect. The maximum franchise fee must be calculated based on gross revenues under Section 622(b), not net revenues. Contrary to the arguments of cable operators, nothing in the Commission's rules can contravene the statutory provisions of Section 622(b).

Moreover, as discussed in more detail in the attached City of Detroit's Petition For Ruling on Complaint, it was not the intent of Congress in allowing cable operators to itemize franchise fees on subscriber bills under Section 622(c) to permit operators to add franchise fees to subscribers' bills in addition to regular charges for cable service. The

House Committee Report (which the FCC has recognized must be given weight[2]) clearly states that a cable operator may not show a franchise fee as an additional charge above the amount charged for cable service under Section 622(c). H.R. Rep. No. 628, 102d Cong., 2d. Sess. 86 (1992).

For the reasons stated in NATOA's Petition For Reconsideration, the Commission's decision to permit a cable operator to advertise a "fee plus" rate is inconsistent with Section 622(b) and Section 622(c) of the 1992 Cable Act as well as the Commission's subscriber bill itemization regulation. The City of Detroit supports NATOA's request that the Commission amend Section 76.946 of the Commission's rate regulations to prohibit cable operators from advertising "fee plus" rates in cases where the "plus" rate is a franchise fee itemized pursuant to Section 622(c).

Respectfully submitted,

Attorneys for the City of Detroit

Dated: May 27, 1994

By: John W. Pestle BB

John W. Pestle
Richard W. Butler, Jr.
Business Address:
Bridgewater Place, P.O. Box 352
Grand Rapids, Michigan 49501-0352
(616) 336-6000

Of Counsel:

William Wolfson
Assistant Corporate Counsel
Law Department, City of Detroit
101 City-County Building
Detroit, MI 48226-3491

0020.044

[2] In the Matter of Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Rate Order and Further Notice of Proposed Rulemaking (MM Docket No. 92-266) FCC 93-177 (released May 3, 1993) ¶ 550.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the matter of

DETROIT CABLE COMMUNICATIONS COMMISSION,
Complainant,

v

BARDEN CABLEVISION,
Defendant.

File No. _____

PETITION FOR RULING ON COMPLAINT

TO: The Commission

_____/

The City of Detroit, Michigan, by and through the Detroit Cable Communications Commission, Veterans Memorial Building, Suite 614, 151 W. Jefferson, Detroit, Michigan, ("City"), by its attorneys, Varnum, Riddering, Schmidt & Howlett, hereby files this Petition for Ruling on Complaint against Barden Cablevision, 12775 Lyndon, Detroit, Michigan ("Barden") pursuant to 47 CFR § 76.7 for the reasons set forth below. A copy of this Petition has been served on Barden.

I. BACKGROUND

Pursuant to a 1985 Franchise Agreement, Barden operates a cable television system serving the City. Under the Franchise Agreement, Barden is obligated to pay a quarterly

EXHIBIT A

franchise fee to the City of five percent (5%) of gross revenues from the system.[1] This is the maximum amount permitted under the 1984 Cable Act. 47 USC § 542(b).

For the first eight years of the Franchise Agreement from 1985 - 1993, Barden computed the franchise fee based on five percent (5%) of the total subscriber bill (i.e. gross revenues). For example, in 1987, subscribers paid a total of $12.00 for basic cable service. Of the $12.00 received from subscribers, Barden paid five percent (5%) of that amount or $.60 to the City as a franchise fee. In November 1993, subscribers paid a total of $22.08 for basic cable service. Of the $22.08 received from subscribers, Barden paid five percent (5%) of that amount, or $1.10, to the City as a franchise fee, leaving Barden with net revenue of $20.98 per subscriber.

On November 12, 1993, Barden notified the City that it intended to change the method of computing franchise fees and its subscriber billing method. Barden advised the City that effective December 15, 1993, it would charge $20.98 for basic cable service but then add the franchise fee as a separate item on the bill computed as five percent (5%) of $20.98, not five percent of the total bill. In other words, Barden notified the City that it

---

[1]The Franchise Agreement defines "Gross Revenues" as:

> . . . all cash, credits, property of any kind or nature, or other consideration received directly or indirectly during any Franchise Year by the Company, its affiliates, subsidiaries, parent and any person in which the Company has a financial interest, arising from or attributable to the sale or exchange of Cable Communications Services by the Company within the Franchise Area and in any way derived from the operation of the System including, but not limited to Cable Communications Service fees, basic subscriber service monthly fees, pay-per-view fees, optional service fees, installation, disconnection and reconnection fees, leased channel fees, converter rentals or sales, studio rental, rental of production equipment, personnel fees, and advertising revenues.

would begin computing the franchise fees on net revenues rather than gross revenues. In addition, Barden advised the City that it intended to show the following on subscriber bills:

Basic cable service:	$ 20.98
Franchise Fee (5% of $20.98)	$ 1.05
TOTAL	$ 22.03

This change in the franchise fee computation does not affect the net revenue of Barden as it will continue to receive $20.98 per subscriber for basic service after payment of franchise fees. This change would, however, reduce the amount of the franchise fees paid by Barden from $1.10 to $1.05 for each subscriber, thereby reducing the total amount of franchise fees paid by Barden each year by at least $70,800 (118,000 subscribers x $.05 per month x 12 months).[2]

The City immediately notified Barden that 1) this proposed change would result in an improper calculation of franchise fees under the Franchise Agreement because the five percent (5%) franchise fee must be computed against the total bill charged to the subscriber (i.e. gross revenues) and 2) the proposed itemization of the franchise fees on subscriber bills violated Section 622(c)(1) of the Cable Television Consumer Protection And Competition Act of 1992 ("1992 Cable Act"). 47 USC § 542(c)(1). Barden disagrees with the City's position. The parties have been unable to resolve this dispute after extensive review and discussion. In order to resolve these issues, Barden and the City agreed to submit these disputed issues to the Federal Communications Commission ("FCC") for a formal ruling. These issues are the subject of numerous current disputes between franchising authorities and cable operators across the nation and are therefore of

[2]The loss to the City is actually substantially larger due to the improper reduction of franchise fees on revenues from premium channels, converters, remotes, etc.

significance to national cable television policy under the 1992 Cable Act and FCC Rules. Accordingly, it is proper for the FCC to determine these issues by a ruling on the City's Complaint.

II. ARGUMENT

A. Improper Franchise Fee Computation

47 USC § 542(b) limits franchise fees to five percent of gross revenues derived from the operation of the cable system. "Gross Revenues" as defined under the Franchise Agreement includes the entire amount of revenue received by Barden from subscribers. See Footnote 1. Indeed, Barden's own computation and payment of franchise fees on this basis for eight years under the Franchise Agreement estops Barden from contending otherwise. Barden now attempts to argue, for the first time, that the computation of franchise fees based on the total bill would violate the five percent cap on franchise fees in 47 USC § 542(b). Barden's contention must be rejected.

Nothing in 47 USC § 542(b) supports Barden's assertion. On the contrary, 47 USC § 542(b) states in pertinent part:

> For any twelve-month period, the franchise fees paid by a cable operator with respect to any cable system shall not exceed 5 percent of such cable operator's gross revenues derived in such period from the operation of the cable system.

(Emphasis added)

Clearly, the limit in 47 USC § 542(b) is five percent of gross revenues. The statute does not measure the five percent maximum franchise fee against net revenues (gross revenues less expenses such as franchise fees), as Barden apparently contends. Hence, as applied to subscriber revenues, the five percent maximum in 47 USC § 542(b) is measured against the subscriber's total bill, i.e. the gross revenues received from subscribers. As previously

stated, Barden cannot now claim to the contrary as the result of its own actions over the first eight years of the Franchise Agreement.

Moreover, Barden cannot claim that its change in the computation of franchise fees is necessitated by its decision to itemize franchise fees on subscriber bills. As discussed in II.B. below, Section 622(c)(1) of the 1992 Cable Act allows a cable operator to identify the portion of a subscriber's total bill which is attributable to the franchise fee. The FCC has expressly recognized, however, that the itemization of franchise fees on subscriber bills under Section 622(c)(1) cannot change the proper computation of these fees. In Rate Order and Further Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 93-177 (released May 3, 1993) ("Rate Order"), the FCC concluded in footnote 1416 that:

> Some franchising authorities express concern that cable companies may use itemization to change the manner in which they calculate franchise fees. See NYSCCT Reply Comments at 6; MCATC Comments at 28-9. Section 622(c) affects the format, not the content of subscriber bills. It is intended to disclose costs attributable to governmental authorities and not to directly affect the amount of these costs.

(Emphasis added).

Hence, the itemization of franchise fees as subscriber's bills does not alter Barden's obligation to compute and pay five percent (5%) of the total bill as a franchise fee.

State agencies have also ruled in favor of the City's position on this issue. In In the Matter of the Itemization of Franchise Fees on Subscriber Bills, 92-217, Docket No. 90389, (released April 20, 1992), (a copy of which is attached as Exhibit A), the New York State Commission on Cable Television ruled that nothing in the Cable Act suggests that Congress intended to permit cable operators to reduce franchise fee obligations by manipulating the itemization of franchise fees on subscriber's bills. See p. 3.

Barden will apparently argue that its change in the franchise fee computation is required by the FCC's benchmark methodology for rate regulation purposes. Barden's contention is erroneous. First, 47 USC § 542(b) was enacted as part of the 1984 Cable Act and was in effect long before rate regulation was authorized by the 1992 Cable Act. Second, Barden has filed a Petition For Reconsideration with the FCC challenging the City's certification to regulate basic cable service rates on "effective competition" grounds. As a result of that Petition, regulation of Barden's rates is presently subject to an automatic stay. 47 CFR 76.911(c)(1). While the City does not agree that Barden is subject to "effective competition" and has filed an Objection to Petition For Reconsideration, Barden cannot contend that it must alter its computation of franchise fees due to rate regulation if Barden is not currently subject to rate regulation. In fact, in a letter dated November 29 to the City, Barden stated that its proposed changes in the computation and itemization of franchise fees were "voluntary as we are not subject to rate regulation."

Third, assuming Barden is subject to rate regulation (as the City maintains), Barden's claim that a change in the franchise fee computation and itemization is required by the rate regulation methodology established by the FCC is incorrect. The calculations required by the FCC Rules and Form 393 for purposes of comparing the FCC's benchmarks against Barden's rates simply are not relevant to the proper calculation of franchise fees under the Franchise Agreement. The calculations under FCC Rules and Form 393 exclude franchise fees only for purposes of comparing the rates of a cable operator to the FCC benchmarks.

Once the benchmark rate is determined, franchise fees may then be added back in to determine the total charge to subscribers but the FCC Rules and Form do not modify the amount of such franchise fees to be computed. The FCC Rules and Form 393 thus do not alter a cable operator's franchise fee obligations. On the contrary, a cable operator can

easily calculate the subscriber's total bill so that the franchise fee equals five percent (5%) of the total bill. For example, a cable operator with a benchmark of $28.50 would ask, "28.50 is 95% of what number?". The answer is $30, so the operator would add the difference ($1.50) to the $28.50, charge subscribers $30 a month for basic service and pay a $1.50 franchise fee to the City. Thus, the franchise fee would equal 5% of the subscriber's total bill (i.e., gross revenues).

As a result, nothing in the FCC benchmarks or Form 393 modifies the amount of the franchise fees which Barden is required to compute and pay under the Franchise Agreement. Form 393 does not require or even suggest that a cable operator must alter the franchise fee calculation under its Franchise Agreement. Moreover, nothing in the FCC benchmarks or Form 393 modifies the five percent maximum established by 47 USC § 542(b).[3]

Barden's proposed change in the method of computing the franchise fees paid to the City violates the Franchise Agreement and is not mandated by 47 USC § 542(b), Section 622(c)(1), or the FCC Rules on rate regulation, as Barden argues. Accordingly, the FCC must reject Barden's interpretation of the Cable Act and FCC Rules.

B. Franchise Fee Itemization/Violation of Section 622(c)(1).

Barden's proposed change in subscriber billing violates Section 622(c)(1) of the 1992 Cable Act. 47 USC § 542(c)(1). Section 622(c)(1) provides as follows:

> (c) Each cable operator may identify, consistent with the regulations prescribed by the Commission pursuant to section 623, as a separate line item on each regular bill of each subscriber, each of the following:

[3]Indeed, the FCC Rules and Form 393 cannot contravene a statutory provision of the Cable Act.

(1) The amount of the total bill assessed as a franchise fee and the identity of the franchising authority to which the fee is paid.

* * *

(Emphasis added).

The FCC Rules contain the same provision and provide further that the "charge identified on the subscriber's bill as the total charge for cable service should include all fees and costs itemized" by the cable operator. 47 CFR § 76.985 (emphasis added).

Under Section 622(c)(1) and 47 CFR § 76.985, a cable operator may identify as a separate item in a subscriber's bill the portion of the total bill which is assessed as a franchise fee. For example, if Barden charges $22.08 per month for basic cable service, Barden could state on the bill that five percent, or $1.10, of this amount is paid to the franchising authority as a franchise fee. The Act and the FCC Rules, however, do not permit a cable operator to list the franchise fee on bills as an additional charge (in a manner similar to a sales tax). In fact, this conclusion is expressly supported by the legislative history of the 1992 Cable Act. In connection with Section 622(c)(1), the House Report on the 1992 Cable Act[4] unequivocally states in pertinent part as follows:

> The cable operator shall not identify cost itemized pursuant to [622(c)(1)] as separate costs over and beyond the amount the cable operator charges a subscriber for cable service. The Committee intends that such costs shall be included as part of the total amount a cable operator charges a cable subscriber for cable service. For example, a cable operator might itemize pursuant to [622(c)(1)] a $1.50 per month charge to account for a five percent franchise fee obligation. If a cable operator charges $30 per month for basic cable service, the $1.50 itemized charge shall be included in such amount; the

[4]Barden claims that the House Report is not relevant because the Senate version of the 1992 Cable Act was adopted. Barden's argument is without merit because Section 622(c)(1) was identical in both the House and Senate versions, as the FCC has recognized. Rate Order, ¶550. In addition, the FCC has expressly determined that the House Report must be given weight in interpreting Section 622(c)(1) because it gives specific consideration to the format of subscriber bills. Id.

> cable operator cannot provide the cable subscriber a basic cable bill for $28.50, with a $1.50 additional charge added as a franchise fee. Thus, the bill would show a total charge of $30, but the cable operator would have the right to include in a legend a statement that the $30 basic cable service rate includes a five percent franchise fee, which amounts to $1.50.

House Report at p. 86 (emphasis added).

Under Section 622(c)(1), Barden may itemize the franchise fees by identifying the portion of the total subscriber's bill which is paid as a franchise fee. Barden is prohibited under Section 622(c)(1), however, from showing the franchise fee as an additional charge over and above the amount charged to the subscriber for cable service. Nothing in the FCC benchmarks or Form 393 require or suggest that franchise fees must now be itemized, as Barden argues. In fact, Form 393 expressly recognizes that a cable operator may or may not itemize franchise fees.[5] See FCC Form 393, Part I, Note, p. 3. Only the City's position results in the correct computation of franchise fees on the total bill paid by the subscriber. Barden's position is a prohibited evasion (as evidenced by Barden's practice for the past eight years) because it would incorrectly show the franchise fee as being computed on the net revenues rather than gross revenues received from subscribers.

Based on the foregoing, Barden's proposed itemization of franchise fees on subscriber's bills as an additional charge above the amount charged for basic service violates Section 622(c)(1) of the 1992 Cable Act and 47 CFR § 76.985.

III. CONCLUSION

Barden's proposed change in the computation of franchise fees is not mandated by 47 USC § 542(b) or any provision of the 1992 Cable Act or the FCC Rules. On the contrary, Barden's proposed change is directly contrary to its own computation of franchise

[5]Again, the FCC benchmarks and Form 393 could not contradict a provision of the Cable Act in any event.

fees during the first eight years of the Franchise agreement and violates Barden's obligation under the Franchise Agreement to pay five percent (5%) of gross revenues to the City as a franchise fee. In addition, Barden's proposed itemization of franchise fees as an additional charge on subscriber's bills violates Section 622(c)(1) of the 1992 Cable Act and 47 CFR §76.985.

Accordingly, the City requests the FCC to rule that: 1) Barden's proposed method of franchise fee computation is not mandated by 47 USC § 542(b), or any provision of the 1992 Cable Act or the FCC Rules, and 2) Barden's proposed itemization of franchise fees as an additional charge on subscriber bills violates Section 622(c)(1) of the 1992 Cable Act and 47 CFR §76.985.

Respectfully submitted,

VARNUM, RIDDERING, SCHMIDT & HOWLETT

Dated: December 17, 1993

By: John W. Pestle /RB
John W. Pestle

By: Peter Armstrong /RB
Peter Armstrong

By: Richard W. Butler Jr.
Richard W. Butler, Jr.

Business Address:
Bridgewater Place, P.O. Box 352
Grand Rapids, Michigan 49501-0352
(616) 336-6000

Of Counsel:

William Wolfson
Assistant Corporation Counsel
Law Department, City of Detroit
1010 City-County Building
Detroit, MI 48226-3491

NEW YORK STATE COMMISSION ON CABLE TELEVISION

In the Matter of 92-217

The Itemization of Franchise Fees) DOCKET NO. 90389
on Subscriber Bills)

STATEMENT OF POLICY

(Released: April 20, 1992)

During the past months, various cable companies in the state have commenced the practice of including all or a portion of a franchise fee as a separate line item on a subscriber's bill. The practice is manifest in one of two ways. In some instances, the franchise fee is one of many items, e.g., basic service, premium service, additional outlets, etc. listed in a single column, the amount for which is included with and added to all other amounts to arrive at a total amount due. In other instances, the bill recites the various services subscribed to and the amounts thereof, sets forth a subtotal of all such amounts and then includes an amount denominated "franchise fee" which, when added to the subtotal, creates a total amount due at the bottom of the bill. In the latter case, the franchise fee is treated in the same manner as a sales tax. In either case, the fee is stated as if it were a direct charge upon the subscriber.

Some companies have instituted this practice coincidental with a franchise renewal or current increase in the amount of the fee or both. For other companies, the practice is unrelated to the franchise term or any change in franchise fee requirements.

Because the practice raises fundamental issues concerning the effect of federal law and the relation of federal statute to state statute, Commission regulations and franchise fee provisions in cable television franchise agreements, the Commission has determined that it is appropriate at this time to issue a general statement of policy on franchise fee itemization and "pass-throughs."

Itemization of Fee

Section 622(f) of the Cable Communications Policy Act of 1984 ("Cable Act") (47 USC Section 542(f)) provides that "[a] cable operator may designate that portion of a subscriber's bill attributable to the franchise fee as a separate item on the bill." Consistent with this section, a cable operator may include on a subscriber's bill a separate statement indicating the portion of the bill--as a percentage or fixed amount--that will be payable as a franchise fee by the cable company to the franchising authority. This section is not authority for including a franchise fee as a separate billable line item on a subscriber's bill.

In this regard, we note that franchise agreements in New York State have traditionally required franchise fees based on a percentage of revenues--either all or some portion thereof--received by the company from subscribers and, in some cases, from other sources. In other words, the fee is calculated as a percentage of all revenues received without deduction or allocation for such portion of the revenues as may ultimately be paid by the cable company to the municipal government in fulfillment of the franchise fee obligation. This practice is fully consistent with Section 817 of the Executive Law which requires the Commission to impose an assessment upon cable companies calculated on "gross annual receipts."[1] The only exception from "gross annual receipts" recognized in the statute would include sales taxes which are imposed directly on subscribers. (See, e.g., Tax Law, Section 1131(2)) Neither the municipal franchise fee nor the amount of the Commission's assessment is excluded from "gross annual receipts."

The practice of billing the fee as a separate line item in addition to rates transforms the very nature of the fee from a component of doing business calculated on all revenues to a separate add-on charge imposed directly on subscribers. This practice also has the effect of transforming the very method by which the fee is calculated and, therefore, purports to modify the underlying statutory and franchise obligations. A simple example will illustrate the effect of itemization. Assume a cable company has been charging $20 per month for a service under a franchise which requires a franchise fee of 3%. The franchise fee attributable to such bill would be sixty cents. If the company determines to separate and itemize the fee as an add-on in the manner of a sales tax, the bill is likely to read as follows:

Basic service rate	---	$20.00
Franchise fee	---	$0.60
Total		$20.60

---

1 Section 817(2) provides that the Commission "shall. . .bill and collect. . .[from cable companies]. . .the total direct and indirect costs necessary to operate and administer the commission for the. . .state fiscal year." Each company is required to pay a pro rata share of the commission's costs based upon its gross annual receipts when compared to the gross annual receipts of all companies.

"Gross annual receipts" is defined in Section 812(5) as follows: ". . .any and all compensation received directly or indirectly by a cable television company from its operations within the state, including but not limited to sums received from subscribers or users in payment for programs received and/or transmitted, advertising and carrier service revenue and any other moneys that constitute income in accordance with the system of accounts approved by the commission.

Gross annual receipts shall not include any taxes on services furnished by a cable television company imposed directly on any subscriber or user by any municipality, state, or other governmental unit and collected by the company for such governmental unit."

Apart from the fact that this is a rate increase subject to notice requirements (and government approval in the absence of effective competition), it is readily apparent that the company, by its own unilateral act, has purported to change the manner of calculating the fee by reducing the base from the total amount billed to an amount which is artificially described as the "rate." In fact, $0.60 is but 2.91% of $20.60 -- the total amount billed. If the fee is calculated as before -- 3% of the full amount billed -- the fee attributable to the bill would be sixty-two cents. We find nothing in the Cable Act to suggest that Congress intended to transform the nature of a franchise fee or to amend existing franchises by permitting cable television companies to reduce franchise fee obligations by manipulating the subscriber's bill in such manner. On the contrary, the effect of Section 622(a) was to increase from 3% to 5% of gross receipts the amount of franchise fees which could be required in a franchise.

It could be argued that a cable company is free to bill in this manner without also intending to modify its franchise fee obligation. If so, such a bill would be inaccurate and, therefore, misleading. Nothing in the Cable Act authorizes cable companies to engage in inaccurate and misleading billing practices.

We also note the likelihood that some cable companies would argue that the franchise fee is a tax and, as such, is a separately billable item. We need not finally determine whether the franchise fee is a tax for the simple reason that even if the franchise fee is in the nature of the tax, under New York State law it would be in the nature of a special franchise or real property tax; but clearly not in the nature of a sales tax.[2] The special franchise tax is imposed on the owner of the special franchise property, i.e., the cable company, and not on the subscriber directly. As such, it is simply a component of doing business similar to other non-sales taxes and business costs.

---

[2] Section 626 of the Real Property Tax Law ("RPTL") provides as follows:

> "1. (a) When a tax levied on a special franchise is due in any assessing unit, if the special franchise owner has paid such assessing unit for its exclusive use during the past year under any agreement or statute requiring the same, a sum based upon a percentage of gross earnings or other income, a license fee or other sum of money on account of such special franchise possessed by such special franchise owner, which payment was in the nature of a tax, all amounts so paid for the exclusive use of such assessing unit, except money paid or expended for paving or repairing the pavement of a street, highway or public place, and except in a city having a population of one hundred seventy-five thousand or more according to the latest federal census, car license fees or tolls paid for the privilege of crossing a bridge owned by the city, shall be deducted from the tax based on the assessment made by the state board for purposes of the assessing unit, but not otherwise, and the remainder shall be the tax on such special franchise payable for such propose."

In sum, it is our determination that franchise fees cannot be stated as a separate line item on subscriber bills as direct charges on subscribers. This policy does not prevent cable companies from informing subscribers on bills, or otherwise, of the fact that franchise fees are paid to government, including the specific amount of the fee attributable to an individual bill. It is consistent with the Cable Act because companies may include a statement on the bill which identifies the franchise fee without imposing a separate and direct charge for the fee itself.

Pass Through Provisions

We also take this opportunity to express our policy with respect to the so-called "pass through" provisions in the Cable Act. Section 622(c) of the Cable Act (47 USC 542(c)) provides that "[a] cable operator may pass through to subscribers the amount of any increase in a franchise fee unless the franchising authority demonstrates that the rate structure specified in the franchise reflects all costs of franchise fees and so notifies the cable operator in writing." Section 622(c) provides that "[a]ny cable operator shall pass through to subscribers the amount of any decrease in a franchise fee."

The issue here is whether these provisions have meaning in a deregulated cable community.

We note, initially, that for many years prior to the enactment of the Cable Act the rates for premium cable television services had been deregulated by the Federal Communications Commission ("FCC"). See Brookhaven v. Kelly, (428 F.Supp. 1216 N.D. New York (1977); 573 F.2d 765, 2d Cir. (1978)) We also note that in many, if not all, cable television franchise agreements in New York State a franchise fee is required to be paid based on revenues derived by the cable television franchisee from premium services or some portion thereof. In fact, at the time the Cable Act became law, cable companies could unilaterally price premium services to account for all costs including franchise fees and increases therein.

As a practical matter, the Cable Act did not alter the regulatory status of premium services. Section 623 of the statute provides that "[a]ny franchising authority may regulate the rates for the provision of cable service. . .provided over a cable system to cable subscribers, but only to the extent provided under this section." Section 623(b)(1) required the Federal Communications Commission to "prescribe and make effective regulations which authorize a franchising authority to regulate rates for the provision of basic cable service in circumstances in which a cable system is not subject to effective competition." Under Section 623, only basic cable service can be subject to rate regulation.[3] Cable companies remain free

[3] Although basic cable service is defined in such a way as it is theoretically possible that single channel premium services could be marketed as part of basic service, we are not aware of any such circumstances and it is unlikely that a cable company which is not subject to effective competition would choose to submit rates for premium service to regulation by such marketing practice.

to price "premium" services without the need for governmental review and approval--a right which transcends the more limited language in Section 622(c) which merely permits a rate increase in the event of an increase in franchise fees.

We note, as well, that historically, "pass-through" is used in utility ratemaking to permit a cost or change in cost to be included in the regulated rate borne by ratepayers.

It fully appears, therefore, that the pass-through provisions in Section 622(c) of the Cable Act are intended to enable cable television companies to increase regulated rates by an amount equal to any current increase in the franchise fee attributable to the regulated rate.[4] Similarly, the obligation imposed by Section 622(e) to decrease rates by any reduction in the franchise fee is only sensible in an environment where rates are regulated. Otherwise, there is no real benefit to subscribers. In sum, the pass-through provisions are redundant in rate deregulated communities. Granting to a cable company the unilateral ability to charge to subscribers whatever rate it wants--as the Cable Act does--transcends and makes meaningless cost pass-throughs which are reflective of a rate regulated environment.

SO ORDERED.

Commissioners Participating: William B. Finneran, Chairman; Theodore E. Mulford, John A. Passidomo, Barbara T. Rochman, Commissioners.

[4] It is important to note here (1) that Congress sanctioned basic rate regulation for a minimum of two years following the effective date of the Cable Act for all cable systems irrespective of the existence of effective competition, and (2) that FCC regulations rather than statutory mandates caused most cable systems to be rate deregulated.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the matter of:

DETROIT CABLE COMMUNICATIONS COMMISSION,

Complainant,

v

BARDEN CABLEVISION,

Defendant.

File No. _____

TO: The Commission

_____/

AFFIDAVIT OF IFETAYO B. JOHNSON

IFETAYO B. JOHNSON, having been first duly sworn, deposes and says:

1. That she is the Executive Director of the Cable Commission for the City of Detroit.

2. That she had read the foregoing Petition for Ruling on Complaint, that she has actual knowledge of the facts set forth therein, and that they are true and correct to the best of her knowledge and belief.

Ifetayo B. Johnson

Subscribed and sworn to before me
this 17th day of December, 1993.

William M Abbott
Notary Public, Wayne County, MI
My Commission Expires: 5-1-1994

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the matter of

DETROIT CABLE COMMUNICATIONS COMMISSION,

Complainant,

PROOF OF SERVICE

v

BARDEN CABLEVISION,

Defendant.

File No. _____

TO: The Commission

_____/

STATE OF MICHIGAN)
)ss
COUNTY OF KENT)

I, Kim Smith, being first duly sworn, deposes and says that on the 17th day of December, 1993, I served a copy of the City of Detroit's Petition for Ruling on Complaint by regular U.S. mail, upon:

Eric E. Breisach
HOWARD & HOWARD
107 W. Michigan Avenue, #400
Kalamazoo, MI 49007-3970

John D. Rawcliffe
Vice President and General Manager
Barden Cablevision
12775 Lyndon
Detroit, MI 48227

Kim Smith

Kim Smith

Subscribed and sworn to before me, a Notary Public, this 17th day of December, 1993.

Debra L. Tiejema

Debra L. Tiejema, Notary Public
State of MI, County of Kent
My Commission Expires: 6-15-94

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket No. 92-266
Rate Regulation	)	

PROOF OF SERVICE

I, Kim Smith, being first duly sworn, deposes and says that on the 27th day of May, 1994, I served a copy of the City of Detroit's Response in Support of Petition For Reconsideration and Clarification by the National Association of Telecommunications Officials and Advisors, The National League of Cities, the United States Conference of Mayors, the National Association of Counties, and the City of New York, by regular U.S. mail, upon:

William E. Cook, Jr.
Arnold & Porter
1200 New Hampshire Ave., N.W.
Washington, DC 20036

Kim Smith
Kim Smith

Subscribed and sworn to before me, a Notary Public, on this 27th day of May, 1994.

Notary Public
State of MI, County of Kent
My Commission Expires: 5/22/95